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No. 00-1030

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

GRANT VENEY LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

Samuel J. Buffone,
Counsel of Record
David O. Stewart
William M. Carter, Jr.
ROPES & GRAY
One Franklin Square
1301 K St., N.W.
Suite 800 East
Washington, DC 20005
(202) 626-3900

Counsel for Petitioner

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ARGUMENT

The United States' Brief in Opposition ("Gov. Brf.") presents for the first time in this case the fallacious argument that the jurisdictional element of the charged offense depends on "legislative" rather than "adjudicative" facts, so federal courts may take this element of the offense away from the jury without violating the Sixth Amendment, due process or Federal Rule of Evidence 201(g). Rather than support the United States' position, the government's new argument in fact highlights the conflict among the circuits that warrants review and resolution by this Court.

While some courts of appeals have held that whether the offense occurred within the "special maritime and territorial jurisdiction of the United States" is a legislative fact not

subject to Rule 201, *see* Gov. Brf. at 6-7 and cases cited therein, others have found jurisdictional facts to be "adjudicative" facts. The First Circuit, in reviewing whether the district court properly took judicial notice of the jurisdictional status of a federal prison, held that "[w]here the prison sits is an element of the offense and unquestionably an adjudicative fact . . . ." *United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999). The Court of Military Appeals and the Sixth and Ninth Circuits also have squarely held that jurisdictional facts were adjudicative and that judicial notice of those facts was therefore subject to Rule 201. *See United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984); *United States v. Mentz*, 840 F.2d 315, 322 n.13 (6th Cir. 1988); *United States v. Dior*, 671 F.2d 351, 358 n.11 (9th Cir. 1982).[1] *See also* Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5103 n. 16 (1999 Supp).

The government's new argument also begs the question whether the district court's instruction removing this element of the offense from the jury's consideration violates this Court's holdings on a defendant's constitutional right to a jury determination of all elements of the offense beyond a reasonable doubt. "Whether a fact is adjudicative or legislative depends not on the nature of the fact -- *e.g.*, who owns the land -- but rather on the use made of it (*i.e.*, whether it is a fact germane to what happened in the case or a fact useful in formulating common law policy or interpreting a statute) and the same fact can play either role depending on

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[1] Indeed, the Fourth Circuit in this case indicated that the jurisdictional question presented adjudicative facts. Using the words of Rule 201(b), the court held that judicial notice was proper because Fort Belvoir's location was "generally known" and verifiable from "sources whose accuracy cannot reasonably be questioned." App. 7a. Had the Fourth Circuit believed that the jurisdictional issues in this case were legislative facts, it would not have rested its holding on Rule 201(b), since Rule 201, by its terms, only applies to adjudicative facts. The government itself recognizes that the Fourth Circuit treated Fort Belvoir's jurisdictional boundaries as an issue of adjudicative fact subject to judicial notice under Rule 201(b). *See* Gov. Brf. at 3.

context." *Bello*, 194 F.3d at 22 (quoting Fed. R. Evid. 201, Advisor Committee's notes). Territorial jurisdiction is an element of the offense with which Petitioner was charged; labeling it as "legislative" does not mean it is no longer an element of the offense that must be submitted to a jury and be proved beyond a reasonable doubt. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *Rose v. Clark*, 478 U.S. 570, 578 (1986); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

In any event, the jurisdictional status of a federal enclave is not immutable. The federal government may cede jurisdiction of all or part of a federal installation at any time or transfer property to a private entity, either of which may remove the property from the "special maritime or territorial jurisdiction of the United States" under Art. I, § 8, cl. 17 of the United States Constitution and 18 U.S.C. § 7(3). The jurisdictional status of the Defense Logistics Agency building where the alleged offense occurred therefore could have changed since the federal government acquired the grounds comprising Fort Belvoir and may change in the future. In *United States v. Goings*, 504 F.2d 809 (8th Cir. 1974), for example, defendants were charged with an assault within the special territorial jurisdiction of the United States on the grounds of Fort Lincoln. *Id.* at 810. The Eighth Circuit affirmed the dismissal of the federal prosecution because the United States had divested itself of exclusive jurisdiction over the area of the fort where the assault occurred when it transferred that property to a private corporation. *Id.* at 811-812. Equally, the jurisdictional status of the site of the alleged offense here must be proved beyond a jury's reasonable doubt as an element of the federal crime with which Petitioner was charged, and therefore is not properly treated as a legislative fact.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Samuel J. Buffone
Counsel of Record
David O. Stewart
William M. Carter, Jr.
ROPES & GRAY
One Franklin Square
1301 K Street, N.W.
Washington, D.C. 20005
(202) 626-3900

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